

requires individual arbitration in employment disputes, and does not permit class or collective action procedures, is valid and enforceable.

2. There are over thirty similar petitions for review pending before this Court. NLRB Opp’n Brief, *PJ Cheese, Inc. v. NLRB*, Case No. 15-60610, at 4 (5th Cir. June 8, 2016).

3. On February 25, 2016, the NLRB issued a Decision and Order finding that UnitedHealth violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”) by “maintaining and enforcing an arbitration policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.” *UnitedHealth Group, Inc.*, 363 NLRB No. 134, at 1 (Feb. 25, 2016).

4. In concluding that UnitedHealth violated Section 8(a)(1), the NLRB relied on its decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). *UnitedHealth Group, Inc.*, 363 NLRB No. 134, at 1.

5. This Court has rejected the NLRB’s position in the very same cases upon which the NLRB relied to determine that UnitedHealth’s arbitration policy

violated Section 8(a)(1). *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).¹

6. On March 1, 2016, UnitedHealth filed its Petition for Review, in which it sought to set aside the NLRB's Decision and Order as not supported by substantial evidence and as contrary to law.

7. On June 24, 2016, the NLRB filed a cross-petition to enforce its Decision and Order.

8. UnitedHealth's opening brief is currently due on August 3, 2016.

9. In light of the Court's decisions in *D.R. Horton* and *Murphy Oil*, UnitedHealth now requests summary disposition granting its Petition for Review in full and denying the NLRB's Cross-Petition for Enforcement in its entirety.

10. Summary disposition is appropriate where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

¹ In *D.R. Horton* and *Murphy Oil*, the NLRB held that the arbitration agreements in question also violated Section 8(a)(1) because employees would reasonably construe their arbitration agreement to prevent them from filing charges with the NLRB, and the Court agreed. *D.R. Horton, Inc.*, 737 F.3d 364; *Murphy Oil USA, Inc.*, 808 F.3d at 1021. It is important to note that the NLRB *has not* charged UnitedHealth with violating Section 8(a)(1) with regard to whether its arbitration policy could be construed to prevent employees from filing a charge with the NLRB and the arbitration policy clearly and specifically permits such filings.

11. First, based on this Court's settled precedent, there is no substantial question as to the outcome of this case. The Court's decisions in *D.R. Horton* and *Murphy Oil* make clear that orders from the NLRB finding class and collective action waivers invalid will not be enforced in this Circuit. *Murphy Oil USA, Inc.*, 808 F.3d at 1018; *D.R. Horton, Inc.*, 737 F.3d at 344.

12. Second, the Court's rule of orderliness supports granting UnitedHealth's motion for summary disposition. The rule of orderliness provides that "one panel of [the] court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (citation omitted). There have been no intervening changes in the law that would permit overturning *D.R. Horton* and *Murphy Oil*. There have been no statutory amendments regarding class and collective action waivers in employment agreements, the Supreme Court has not reviewed or ruled on this issue, and this Court has refused *en banc* review in both *D.R. Horton* and *Murphy Oil*. *D.R. Horton*, No. 12-60031 (5th Cir. Apr. 16, 2014); *Murphy Oil*, No. 14-60800 (5th Cir. May 13, 2016).

13. Third, this Court has granted similar motions for summary disposition in other cases. *See, e.g., 24 Hour Fitness USA, Inc. v. NLRB*, No. 16-60005 (5th Cir. June 27, 2016); *PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 WL 3457261, at

*1 (5th Cir. June 16, 2016); *On Assignment Staffing Servs., Inc. v. NLRB*, No. 15-60642 (5th Cir. June 6, 2016).² In granting these motions for summary disposition, this Court has rejected the NLRB's arguments that the Seventh Circuit's decision in *Lewis v. Epic Systems Corp.*, No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016), somehow affects the outcome of the cases pending in the Fifth Circuit. *See* NLRB Opp'n Brief, *24 Hour Fitness USA, Inc. v. NLRB*, No. 16-60005, at 3 (5th Cir. June 22, 2016); NLRB Opp'n Brief, *PJ Cheese, Inc. v. NLRB*, Case No. 15-60610, at 3 (5th Cir. June 8, 2016).

14. Because the issues presented in *D.R. Horton*, *Murphy Oil*, *24 Hour Fitness USA, Inc.*, *PJ Cheese*, and *On Assignment Staffing Services* are the same as the issues presented by UnitedHealth here, UnitedHealth's Motion for Summary Disposition should be granted and the NLRB's Decision and Order should not be enforced.

15. Counsel for the NLRB opposes this motion.

² This Court declined to grant summary disposition, without prejudice, in *SF Markets, LLC d/b/a Sprouts Farmers Market v. NLRB*, No. 16-60186 (5th Cir. June 7, 2016), but in light of *PJ Cheese*, the employer has renewed its motion for summary disposition, which is pending as of the time of this motion.

Dated: July 5, 2016

Respectfully submitted,

SEYFARTH SHAW LLP

/s/ Peter A. Walker

Peter A. Walker

Christopher H. Lowe
Lori M. Meyers
John T. DiNapoli
620 Eighth Avenue
New York, New York 10018
Telephone: (212) 218-5500
Facsimile: (212) 218-5526
pwalker@seyfarth.com
clowe@seyfarth.com
lmeyers@seyfarth.com
jdinapoli@seyfarth.com

Robert J. Carty, Jr.
700 Milam Street, Suite 1400
Houston, TX 77002
Telephone: (713) 225-2300
Facsimile: (713) 821-0643
rcarty@seyfarth.com

Attorneys for Petitioners Cross-Respondents

CERTIFICATE OF SERVICE

I certify that on July 5, 2016, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for parties who are registered CM/ECF users will be served by the appellate CM/ECF system.

The following parties have been served by U.S. Mail:

Karen P. Fernbach
National Labor Relations Board
Room 3614
26 Federal Plaza
New York, NY 10278-0000

Richard F. Griffin, Jr.
National Labor Relations Board
Appellate & Supreme Court Litigation Branch
1015 Half Street, S.E.
Washington, DC 20570

Deirdre A. Aaron, Esq.
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016

/s/ Peter A. Walker
Peter A. Walker